(20)

IN THE

Supreme Court of the United States

WENDELL J. CALEY
defendant-petitioner

vs

RYAN DISTRIBUTING CORPORATION
plaintiff-respondent

No. 1161
October Term
1944

Petition for Writ of Certiorari
and
Petitioner's Brief
in support thereof

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LAWS, RULES AND AUTHORITY CITED IN BRIEF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary:

Your petitioner, Wendell J. Caley, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review a decision and judgment of that Court sustaining the entry of *judgment non obstante veredicto* on an issue of fact,

in the face of a strong *legal presumption* [1], and uncontradicted testimony of acknowledged probative value (R. 58, lines 13-18) *supporting the verdict,*

and

in the absence of a scintilla of any relevant *new* [2] evidence against the verdict,

thereby re-examining a "fact tried by a jury" and setting aside the verdict based thereon, in a suit at common law;—which verdict was based upon the finding that petitioner had, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) improvement patented to him, and thereby depriving petitioner of the benefit of "the right of trial by jury" and the immunity from re-examination of a "fact tried by a jury . . . otherwise . . . than according to the rules of the common law" guaranteed by the Seventh Amendment of the Constitution of the United States.

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1) a legal presumption, flowing from a prior quasi-judicial determination of the same fact-question by an administrative branch of the Federal Government: *Mumm vs Decker*, 303 U. S. 168, 171; 81 L. Ed. 983, 985 and *Radio Corporation of America vs Radio Engineering Laboratories, Inc.*, 293 U. S. 1; 79 L. Ed. 163 and *Park-In Theatres Inc. vs Rogers*, 130 Fed (2d) 745, 747 (CCA 9); *Abbott vs Coe*, 109 Fed (2d) 449, 451 (App. D. C.), and *Mississippi Valley Barge Line Co. vs United States*, 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265;—which prior quasi-judicial determination of the fact-question was favorable to petitioner and in accord with the jury's fact-finding implied in its verdict

2) that is, no relevant evidence other than what had been the basis of the prior quasi-judicial fact-finding in accord with and favorable to the verdict

Short Statement of Matter Involved

The trial was to determine respondent's liability to petitioner, for respondent's confessed (R. 16-17) infringement of petitioner's patent-in-suit.

Respondent's sole defense (R. 22) to its *prima facie* liability for such confessed infringement was that the patent-in-suit was invalid for "lack of invention over the prior-art" or that petitioner had not, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) improvement patented to him.

Against the strong legal presumption (flowing from the prior quasi-judicial determination of this fact-question by an administrative branch of the Federal Government) that petitioner had, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) construction patented to him [3], respondent offered *nothing* more than

a: a group of prior-art patents in the same art, the most pertinent of which the Patent Office *had considered in connection with the granting of the patent-in-suit,* and which respondent admitted (R. 22), and the trial Judge ruled, did *not* disclose the same construction as that of the patent-in-suit, and in respect to which the trial Judge had ruled that the device of the patent-in-suit was *both new and useful* (R. 26, 30, Q26, 37-38), *plus*

b: a group of "prior-art" patents taken from *other* arts, which patents the trial Judge said "are not anywhere near the patent" in suit (R. 24-26) and as to which the trial Judge said that petitioner's expert witness need spend no time on them, in rebuttal, because they were, in the trial Judge's *then* view, "a waste of time" (R. 26), and as to which the trial Judge, in effect, refused to receive rebuttal testimony tendered by petitioner, on the ground that these prior patents from *other* arts were too remote and of too little (if any) probative value, to warrant rebuttal thereof.

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3) see footnote 1 supra (on page 1)

Respondent relied upon these two groups of prior patents without offering a single witness or a word of oral testimony or any other evidence other than a copy of the so-called "file-wrapper" of the patent-in-suit.

Hence, respondent did not offer a scintilla of evidence against the jury's verdict, other than the same evidence upon which the prior quasi-judicial fact-finding of the Patent Office had been against respondent's sole defense at bar (plus a grist of other "prior-art" patents so remote and irrelevant that the trial Judge, after having them explained to him by respondent's counsel, said that they were "not anywhere near the patent" in suit, and "a waste of time" to consider: R. 26).

Confirmatory of the presumptive [3] presence of invention, there was uncontradicted testimony, adduced on behalf of petitioner, of the prior-marketing (1931-1933) of the "prior-art" device with unfavorable results (R. 34, RDQ28; R. 14, XQ23; R. 15, XQ24; R. 15-16, RDQ28-31); the practical superiority of the construction of the patent-in-suit (in contrast to the "prior-art" construction) both in regard to ease of operation and in regard to end-results (R. 14-15, XQ23-24, RDQ28-31; R. 21, RDQ26); the wide public-acceptance of the device of the patent-in-suit (R. 34); its deliberate copying by respondent (R. 9, 16-17, 23); respondent's seeking an improvement patent thereon (Caley's Exhibit 9); economies of production flowing from the construction of the device of the patent-in-suit which were passed on to the ultimate consumer (R. 34, RDQ29; R. 20-21, Q8-10); expert testimony that it was *not obvious to those skilled in the art* (R. 30, Q27, also CCA at R. 58, lines 13-18); and the testimony of respondent's *alter ego*, L. L. Ryan [4], that she preferred the construction of the patent-in-suit (to those of the expired "prior-art") because

3) see footnote 1, supra (on page 1)

4) formerly employed by petitioner to demonstrate and sell the device of the patent-in-suit, and who had previous extensive experience with many other devices in this field

it worked better and because she "*thought it was the best*" (R. 23, RXQ80).

The legal presumption [3] of presence of invention, and all the aforesaid uncontradicted testimony confirmatory of such presumption, *supported the jury's verdict.*

Indeed, the trial Judge's own appraisal of the evidence, during the trial (R. 24-26; R. 30 Q26), and his charge to the jury (R. 37-38, 40, last paragraph) are in harmony with the verdict reached by the jury.

The *judgment non obstante veredicto* and the decision and judgment of the Circuit Court of Appeals for the Third Circuit sustaining it, were each based solely upon the disclosures of these same two groups of "prior-art" patents;—the decision and judgment of the Circuit Court of Appeals for the Third Circuit (the review of which is hereby sought) being based specifically and exclusively upon

a: the expired Godward patent taken from the first group;—the disclosure of which petitioner had, at the outset, called to the attention of the Patent Office (and to the public, upon the issuance of his patent) by *Figures 8 and 9 of the drawings of the patent-in-suit* marked "Prior-Art" and by the accompanying parts of his patent-specification relating thereto,

and

b: the expired Anderton patent, taken from the second group;—the disclosure of which the trial Judge had appraised as "not anywhere near the patent" in suit and "a waste of time" to consider (R. 25-26), and as to which the trial Judge, in effect, refused to receive testimony tendered by petitioner in rebuttal thereof, on the ground that Anderton was so irrelevant or of so little probative value as not to warrant rebuttal testimony.

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3) see footnote 1, supra (page 1)

In the case at bar, it *affirmatively* appears that "reasonable men could differ" on the conclusions to be drawn from the evidence,

1) because a quasi-judicial administrative tribunal of the Federal Government (i. e., the Patent Office), having considered the same "prior-art" which the trial Judge regarded most pertinent (i. e., Godward and Fraser), reached a conclusion

contrary to that reached by the trial Judge (when he entered judgment notwithstanding the verdict) and

in accord with the conclusion reached by the jury (in rendering its verdict), and

2) because the uncontradicted expert testimony is that petitioner's admittedly new and useful construction of the patent-in-suit would not be obvious to those skilled in the art, even if they had before them all the "prior-art" patents relied upon by respondent, and

3) because respondent, with many years of prior practical experience in the field, and having freely available to it the devices of the "prior-art"[5] preferred the device of the patent-in-suit (against those of the expired "prior-art" freely available to all) because it was more effective in actual use and because respondent "thought it was the best" (R. 23, RXQ80), and

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5) the two patents relied upon by the Circuit Court of Appeals, namely Godward and Anderton, having expired 23 years and 24 years, respectively, *before* respondent's confessed infringement here involved, and the hair-curler of the Godward patent having been marketed to a substantial extent, but with many unfavorable practical results, ten years prior to respondent's confessed infringement

4) because the trial Judge differed with himself as to the weight to be given to the evidence or as to the conclusions to be drawn therefrom;—

having concluded and stated during the trial [6] that the contents or disclosures of the group of "prior-art" patents taken from *other* arts [7], *including, specifically, the Anderton patent,* as well as the contents or disclosures of some of the patents from the same art [8] (namely from the hair-curler art [8]) were "not anywhere near the patent" in suit and a "waste of time" to consider and, for that reason, did not warrant any testimony in rebuttal thereof

(and having, thereafter, at the conclusion of all the evidence, also denied respondent's motion for directed verdict based solely upon the contents of respondent's aforesaid two groups of "prior-art" patents), and

having reached the diametrically opposite (and incompatible) conclusion [9], 40 days after the verdict, that *the Anderton patent* was sufficient, so completely to tip the scales of the evidence,

(including petitioner's several branches of evidence plus a strong legal presumption, all admittedly tending to support the jury's verdict),

as to require the setting aside of the jury's verdict and the entry of a judgment notwithstanding the verdict.

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6) after the conclusion of respondent's case and after *respondent's counsel explained* to the Judge and jury his interpretation of each of the "prior-art" patents

7) group **"b"** referred to on foregoing page 2 hereof, which included the Zeller patent on bag fastener, the Gould patent on label-carrier for luggage, the *Anderton patent for metal-tag for tagging finger-rings in jewelry stores,* the Lenk patent for ear-tags for tagging animals, and the Sagui patent for price-tags for finger-rings

8) group **"a"** referred to on foregoing page 2 hereof, among which the trial Judge specifically discredited the Whelan patent, and, in effect, discredited all patents in this group except Freeman, Godward and Fraser

9) See: R. 44, fifth line from the bottom; and R. 46, last paragraph

A certified copy of the transcript of the Record of the case at bar, including the proceedings of the Circuit Court of Appeals for the Third Circuit, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

Statutory provisions believed to sustain this Court's jurisdiction

This Court has jurisdiction to review the decision and judgment of the U. S. Circuit Court of Appeals for the Third Circuit, sought to be reviewed, under Section 240-a of the Judicial Code (28 USC 347-a):

> "In any case, civil . . . , in a circuit court of appeals . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, . . . after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it . . . ."

The Statutes Involved

This petition for writ of certiorari involves:

the *Seventh Amendment to the Constitution of the United States* guaranteeing the right of trial by jury in suits at common law, and giving immunity from re-examination of a "fact tried by a jury . . . otherwise . . . than according to the rules of the common law",

Sections 566 and 648 of the Revised Statutes of the United States (28 USC 770) which directly carry out the constitutional guarantee of the right of trial by jury of the Seventh Amendment, by legislative enactment providing that "*The trial of issues of fact in the district courts, in all causes* except in equity and cases of admiralty . . . *shall be by jury.*[10]",

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10) all emphasis (as well as all parenthetical interpolations) in quotations contained in this Petition and the following Brief, are ours, unless otherwise indicated

Section 723 of the Revised Statutes of the United States (28 USC 384) which further implements *28 USC 770* in carrying out the constitutional guarantee of the right of trial by jury, by providing that "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.",

Section 4919 of the Revised Statutes of the United States (35 USC 67), further expressly providing for *suits at common law and jury-trials, for the recovery of "damages for the infringement of any patent"*, and

Rule 50-b of the 1938 Rules of Civil Procedure for the District Courts of the United States, relating to *judgments non obstante veredicto.*

The foregoing are set out, in full, in the Appendix hereto.

Date of Decision and Judgment to be Reviewed

The decision (R. 54, and *reported at 147 Fed. 2d 138*) and judgment (R. 59) of the United States Circuit Court of Appeals for the Third Circuit, sought to be reviewed, are each dated *January 17, 1945,* and, therefore, the within petition for writ of certiorari is timely under Section 1008 of the Revised Statutes (28 USC 350), which provides three months from date of the judgment to be reviewed, for filing a petition for writ of certiorari in this Court.

The Questions Involved

The fundamental question:

The fundamental question involved is whether the benefits of trial by jury (and of the immunity from re-examination of a fact found by a jury) are matters of right or matters of grace;—in suits at common law, generally, and in patent suits at common law, particularly, and whether Rule 50-b has so enlarged the trial Judge's powers as to make Rule 50-b a free instrument for the deprivation of the benefits of trial by jury in suits at common law, whenever

the trial Judge merely disagrees with the jury's verdict on a fact-question which was indubitably for the jury to determine.

Because the foregoing question is, of course, fully answered by the Seventh Amendment to the Constitution of the United States and by Section 770 of Title 28 of the United States Code, and because the decision below nevertheless, in effect, *plainly* denies these rights in a case in which the lower Court's own statements of record leave no room for any doubt but that the question was one of fact necessarily for the jury to determine, we now point out and particularize four underlying questions here involved; stating each of questions 2, 3 and 4 first generically and then specifically (1; 2-a & 2-b; 3-a, 3-b & 3-c; and 4-a & 4-b);—so as to point out both the broad aspect as well as the specific application of each of the last three of the underlying questions involved.

Question No. 1: Is *invention* a question of fact for the jury or a question of law for the trial Judge?

where the device of the patent-in-suit is admittedly not anticipated and is admittedly new and useful, and

where the only evidence offered upon the *sole* defense of "non-invention", is the same evidence which the Patent Office had considered in connection with the granting of the patent-in-suit,[11] and

where the presence of invention is confirmed by six branches of evidence of recognized probative value, which courts have always recognized as indicative of the presence of invention.

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11) The only "prior-art" patent relied upon by the trial Judge on the entry of the *judgment non obstante veredicto* which the Patent Examiner had not specifically considered, was the Anderton patent taken from an admittedly **non**-analogous art (R. 46, line 19)

which the trial Judge (*throughout* the trial) regarded as having **no** substantial probative value (R. 25-26), and

which (40 days later) the trial Judge relied upon on the entry of *judgment non obstante veredicto* (R. 44, fifth line from bottom and R. 46, last paragraph) on his arbitrary conclusion, *wholly without support in any evidence* that the combination of a flat-headed crosspiece with non-folding hooking portions and an elongated slit into which it is insertable and from which it is removable, without folding and without destruction, by a 90° turn one way and a 90° turn another way, "*just permeates practically every art in which that sort of device is used at all*" and that "*it is something which is just adopted out of general art.*" (R. 46)

While *this feature* is only *one of several* constructional features which make up the device of the patent-in-suit, *this feature* does **not** "permeate practically every art" as the trial Judge concluded, without evidence, because, of the 15 hair-curler patents and the 5 non-analogous patents cited by respondent, *that feature* is found *only* in Anderton, and even there, only in a metallic tag in which the crosspiece has no tendency to restore itself, as it does in the device of the patent-in-suit, because the metal *stays* in any position into which it is bent. The other 4 non-analogous devices show hooking arrangements suitable only for a single use, instead for repeated re-use, because the hooking arrangement is destroyed or rendered useless by being *once* hooked into locking position;—whereas in the device of the patent-in-suit, the hooking is suitable for repeated re-use of the device because it is resilient and does not hook and unhook by folding the hooking-head, but, instead, by a 90° turn of the resilient body of the device.

If the trial Judge's view during the trial be adopted, then the Anderton patent is irrelevant, whereas if his view upon the entry of *judgment non obstante veredicto* be adopted, then it necessarily follows that the Patent Examiner must impliedly also have considered the feature for which the trial Judge then relied upon the Anderton patent, because then such feature must be regarded a matter of common knowledge and hence also within the Examiner's general knowledge.

Question No. 2-a: Can the legal presumption of the correctness of a prior quasi-judicial fact-finding of an administrative tribunal of the Federal Government, be overcome sufficiently to justify entry of *judgment non obstante veredicto* on the same issue of fact, in the face of substantial trial-evidence of acknowledged probative value confirming the correctness of such prior quasi-judicial fact-finding and supporting the jury's verdict, by merely re-introducing, in Court, the *same* evidence upon which such prior quasi-judicial fact-finding was based, plus some assertedly "new evidence" which the trial Judge (*throughout* the trial) regarded as having **no** substantial probative value?

or, stating it another way,

Question No. 2-b: Is the legal presumption of the presence of invention [12] flowing from the prior quasi-judicial determination of this fact-question by an administrative tribunal of the Federal Government (i. e. the Commissioner of Patents)

a) neutralized by *merely* introducing in evidence the *same* "prior-art" patents which that administrative tribunal had considered in connection with its determination,[13] *plus* a group of additional "prior-art" patents which the trial Judge concluded were *"not anywhere near the patent" in suit and "a waste of time" to consider,*

and, if so,

b) is such legal presumption [12] *thereby* overcome so conclusively as to justify the trial Judge's re-

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12) *Mumm vs Decker*, 303 U. S. 168, 171; 81 L. Ed. 983, 985 and *Radio Corporation of America vs Radio Engineering Laboratories, Inc.*, 293 U. S. 1; 79 L. Ed. 163 and *Park-In Theatres Inc. vs Rogers*, 130 Fed (2d) 745, 747; CCA 9, *Abbott vs Coe* 109 *Fed* (2d) 449, 451 (App. D. C.) and *Mississippi Valley Barge Line Co. vs United States* 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265

13) which "prior-art" patents are *admitted* by the party offering them, and ruled by the trial Judge, **not** to disclose the same construction as that of the patent-in-suit

examination and over-riding of the jury's fact-finding of "invention";—

c) all without a scintilla of *other* evidence against such legal presumption of the presence of invention,

and

d) all *in the face of uncontradicted testimony confirmatory of the legal presumption of the presence of invention,* including testimony of the practical superiority of the construction of the patent-in-suit, over the construction of the "prior-art"; of the confessed infringer's recognition of this superiority and the infringer's testimony that she "thought it was the best"; the infringer's preference for and copying of the device of the patent-in-suit (against the "prior-art" devices freely available to the infringer); the infringer's attempt to obtain an improvement upon the device so copied; the prior marketing of the device of the expired "prior-art" with unfavorable results; the wide public-acceptance of the device of the patent-in-suit; the manufacturing economy flowing from the construction of the patent-in-suit, which were passed on to the ultimate consumer; and the uncontradicted expert testimony that it would not be obvious, to those skilled in the art, to produce the construction of the patent-in-suit, even though they had before them all the "prior-art" relied upon by the infringer?

Question No. 3-a: Does Rule 50-b enlarge the trial Judge's powers (in respect to the Seventh Amendment to the Constitution of the United States, and Section 770 of Title 28 of the United States Code which implements said Amendment) so as to permit the trial Judge to enter *judgment non obstante veredicto* on an issue of fact, where the jury's verdict is admittedly supported

by a prior quasi-judicial fact-finding of an administrative tribunal of the Federal Government, and

by the acknowledged legal presumption of correctness of such prior fact-finding of said administrative tribunal, and

by uncontradicted testimony of acknowledged probative value;—

without a scintilla of evidence against the jury's fact-finding implied in its verdict, other than the *same* evidence upon which such prior quasi-judicial fact-finding of the administrative tribunal was based (plus additional documents which the trial Judge had regarded so remote and irrelevant, throughout the trial, as to be "a waste of time" to consider)?

or, stating it another way,

Question No. 3-b: Was not the trial Judge barred, by the Seventh Amendment to the Constitution and by Section 770 of Title 28 of the United States Code, from re-examining (and over-riding) the *fact* of "invention" *found by the jury?*

A: where the jury's verdict, based upon its finding of the presence of invention, was supported

1) by a prior quasi-judicial determination by a Federal administrative tribunal that invention was in fact present, which administrative tribunal had considered all of the same prior patents which the trial Judge, during the trial, had considered most pertinent,

2) by the confessed infringer's *admission* and the trial Judge's ruling that neither the prior patents which had been considered by the Patent Office in connection with the granting of the patent-in-suit nor any other prior patent disclosed the same *construction* as that *of the patent-in-suit*, and that the latter was *both new and useful* notwithstanding all the prior patents,

3) by the uncontradicted expert testimony that it would *not* be obvious to those skilled in the art to produce the admittedly new and useful construction of the patent-in-suit, even if they had before

them all of the "prior-art" patents relied upon by the respondent,

4) by the *admission* of respondent's *alter ego* (who had had many years of prior practical experience in the field) that she preferred the construction of the patent-in-suit (against those of the prior-art), because it was the easiest to use and most effective in actual use and because she "thought it was the best"; and the *admission* of respondent's deliberate copying of the device of the patent-in-suit and of the respondent's seeking an improvement patent thereon,

5) by the uncontradicted testimony of other witnesses that the device of the patent-in-suit was superior in operation and in actual use and produced a superior end-result in the hair,

6) by the uncontradicted testimony of the wide public acceptance of the device of the patent-in-suit,

7) by the uncontradicted testimony of production-economies flowing from the construction of the patent-in-suit, which were passed on to the ultimate consumer, and

8) by the trial Judge's own conclusion, during the trial, that one group of prior-art patents relied upon by respondent were "*not anywhere near the patent*" *in suit* and were "*a waste of time*" *to consider*, and that the other group of patents, regarded most pertinent, did *not* disclose the same construction as that of the patent-in-suit, and that the device of the patent-in-suit was both new and useful notwithstanding these other prior patents,

and

B: where there is *not a scintilla of evidence against the jury's verdict*, other than

prior patents which the Commissioner of Patents had considered in making the prior quasi-judicial fact-

finding favorable to the patent-in-suit (and in harmony with the jury's verdict), and which patents the trial Judge had ruled did not disclose the same construction as that of the patent-in-suit, and

prior patents which the trial Judge had regarded (*throughout* the trial) as "not anywhere near the patent" in suit and "a waste of time" to consider.

Question No. 3-c: Is respondent's Motion to Set Aside Verdict (R. 43) based on a "*legal question*" within the meaning of Rule 50-b (and was it properly raised by respondent's Motion to Direct Verdict (R. 42) *stating "specific grounds"* within the meaning of Rule 50-a), which *was* reserved by Rule 50-b for "later determination" by the trial Judge when he denied (R. 35) respondent's Motion to Direct Verdict (R. 42)?

Question No. 4-a: May the trial Judge enter *judgment non obstante veredicto* for asserted insufficiency of the evidence, where such judgment was necessarily based upon evidence which he had theretofore (*throughout* the trial) considered to be so remote and of such doubtful probative value as to cause him to decline to receive testimony in rebuttal thereof [14]?

or, stating it another way,

Question No. 4-b: Does not the fact that the trial Judge reached two different (and mutually incompatible) conclusions (one during trial, and the other 40 days thereafter) in respect to a piece of evidence necessarily relied upon to sustain a *judgment non obstante veredicto,*

conclusively establish that "reasonable men could differ" as to the conclusion to be drawn from the evidence, and

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14) apparently because of his view, during the trial, that such piece of evidence did *not* have sufficient probative value to warrant its rebuttal

compel submission of such evidence for the jury's verdict, as being within its sole province, and

bar the entry of *judgment non obstante veredicto* in respect thereto? and

is not the entry of *judgment non obstante veredicto* then a deprivation of the benefits of a right of trial by jury and of the immunity from re-examination of a fact tried by a jury, under the Seventh Amendment to the Constitution and Section 770 of Title 28 of the United States Code?

Reasons Relied Upon for the Allowance of a Writ of Certiorari

The discretionary power of this Court, under Section 240-a of the Judicial Code (28 USC 347-a), is invoked on the following grounds:

1. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, in conflict with the hereinbelow cited decisions of this Court and of Circuit Courts of Appeals of the United States for other Circuits, namely:

a) As to what is within the sole province of the jury to determine, under the constitutional guarantees of the Seventh Amendment, the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar, is in conflict with:

Berry vs U. S. 312 U. S. 449, 453; 85 L. Ed. 945, 947
Gunning vs Cooley 281 U. S. 90, 94; 74 L. Ed. 720, 724
Slocum vs N. Y. Life Ins. Co. 228 U. S. 364; 57 L. Ed. 879
Pedersen vs Delaware, L. & W. R. Co. 229 U. S. 146, 153; 57 L. Ed. 1125, 1128
Conway vs O'Brien 312 U. S. 492; 85 L. Ed. 969
Halliday vs U. S. 315 U. S. 94, 95, 96; 86 L. Ed. 711, 715

b) As to the trial Judge's powers under Rule 50-b to weigh the evidence (and to re-examine and over-ride the jury's verdict thereon), the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Virginia-Carolina Co. vs Dunbar 106 Fed. (2d) 383, 385 (CCA 4)

Duncan vs Montgomery Ward 108 Fed. (2d) 848 (CCA 8) modified at 311 U. S. 243 (85 L. Ed. 147) with an implied approval of the point for which we cite the case

Berry vs U. S. 312 U. S. 449, 453; 85 L. Ed. 945, 947

c) As to the meaning and effect, and weight to be given (and as to what is required to overcome) the legal presumptions attaching to a prior quasi-judicial determination by an administrative tribunal of the Federal Government, the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Mumm vs Decker 303 U. S. 168, 171; 81 L. Ed. 983, 985

Radio Corporation of America vs Radio Engineering Laboratories, Inc. 293 U. S. 1; 79 L. Ed. 163

Park-In Theatres Inc. vs Rogers 130 Fed. (2d) 745, 747; (CCA 9)

Abbott vs Coe 109 Fed. (2d) 449, 451 (App. D. C.)

Mississippi Valley Barge Line Co. vs United States 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265

d) As to whether invention is a question of fact for a jury or a question of law for the trial Judge, the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Keyes vs Grant 118 U. S. 25; 30 L. Ed. 54, 57, 58

Thomson Spot Welder Co. vs Ford Motor Co. 265 U. S. 445, 446; 68 L. Ed. 1098, 1100

U. S. vs Esnault-Pelterie 299 U. S. 201, 205; 81 L. Ed. 123, 125

2. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, in conflict with and in violation of the Seventh Amendment to the Constitution of the United States, guaranteeing trial by jury and immunity from re-examination of a fact found by a jury, and in violation of Section 770 of Title 28 of the United States Code implementing said Amendment.

3. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, on important questions of Federal law which have not been, but should be, settled by this Court, namely, Questions 2 and 4 set out on foregoing pages 11 and 15, respectively.

4. The Circuit Court of Appeals for the Third Circuit, has so far departed from the accepted and usual course of judicial proceedings (in that it sanctions such departure by the trial Court) as to call for the exercise of this Court's power of supervision.

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WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed and that your petitioner may be granted such other and further relief as may seem proper; —all to the end that petitioner may have the benefit of the verdict which the jury rendered in this cause in favor of

petitioner, and that the right of trial by jury may be preserved intact.

WENDELL J. CALEY
by Wm. Steell Jackson
Leonard L. Kalish
counsel for petitioner

The undersigned hereby certify that the foregoing petition is in their opinion well founded, and that the case is one in which petitioner's prayer should be granted by this Court.

Wm. Steell Jackson
Leonard L. Kalish
counsel for petitioner